IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-447

WILLIAM G. MILLIKEN, Governor of the State of Michigan; FRANK J. KELLEY, Attorney General of the State of Michigan; MICHIGAN STATE BOARD OF EDUCATION, a constitutional body corporate; JOHN W. PORTER, Superintendent of Public Instruction of the State of Michigan, and ALLISON GREEN, Treasurer of the State of Michigan,

Petitioners,

- vs -

RONALD BRADLEY and RICHARD BRADLEY, by their Mother and Next Friend, VERDA BRADLEY; JEANNE GOINGS, by her Mother and Next Friend, BLANCH GOINGS; BEVERLY LOVE, JIMMY LOVE and DARRELL LOVE, by their Mother and Next Friend, CLARISSA LOVE; CAMILLE BURDEN, PIERRE BURDEN, AVA BURDEN, MYRA BURDEN, MARC BURDEN and STEVEN BURDEN, by their Father and Next Friend, MARCUS BURDEN; KAREN WILLIAMS and KRISTY WILLIAMS, by their Father and Next Friend, C. WILLIAMS; RAY LITT and MRS. WILBUR BLAKE, parents; all parents having children attending the public schools of the City of Detroit, Michigan, on their own behalf and on behalf of their minor children, all on behalf of any person similarly situated; and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, DETROIT BRANCH; BOARD OF EDUCATION OF THE CITY OF DETROIT, a school district of the first class; DETROIT FEDERATION OF TEACHERS, LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Dated: October 27, 1976.

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CONSTITUTION

PUBLIC ACTS

IN THE SUPREME COURT OF THE UNITED STATES
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No. 76-447

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Petitioners,

v

RONALD BRADLEY, et al,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, the Board of Education for the School District of the City of Detroit, respectfully prays that this Petition for Writ of Certiorari be denied.

OPINIONS AND ORDERS BELOW

Respondent, Detroit Board of Education for the School District of the City of Detroit adopts Petitioners' statement of Opinions and Orders of the courts below.

JURISDICTION

Respondent, Detroit Board of Education for the School District of the City of Detroit adopts Petitioners' statement of Jurisdiction.

QUESTIONS PRESENTED

I.

Whether the decision of the Court of Appeals affirming inclusion of educational components in Detroit's desegregation

plan was clearly within its equity powers and supported by record evidence?

II.

Whether the Constitution or decisions of this Court prohibit the lower courts here from compelling the State defendants who have been found guilty of *de jure* segregation to pay for part of the cost of desegregation?

III.

Have any significant questions of federal law been raised in this Petition?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendments, Article XIV, Section 1—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is a school desegregation case. While the issues raised by the petitioners, the State defendants, concern the remedial phase of this case, the State defendants would have this Court ignore the fact that the remedial phase was preceded by a violation stage initiated by a complaint filed on August 18, 1970 by individual black and white school children and their parents, and the Detroit branch of the NAACP against the Board of Education of the City of Detroit, its members, and the then Superintendent of Schools, as well as the Governor, the Attorney General, the State Board of Education and the State Superintendent of Public Instruction. The Treasurer of the State of Michigan was subsequently added as a defendant. The complaint alleged that the Detroit public school system was segregated on the basis of race as the result of actions and policies of the Board of Education and of the State of Michigan as well. The litigation was triggered by the passage of Act 48 of the Public Acts of 1970 by the State Legislature. This State Act was a deliberate attempt to stop the Detroit Board which was implementing its own desegregation plan.

After trial of the case on the issue of segregation, the District Court held that the Detroit public school system was racially segregated as a result of the unconstitutional practices of both the defendant Detroit Board and the Michigan State defendants. 338 F Supp at 582.

Further proceedings concerning proposed desegregation plans culminated in an Order of the District Court requiring preparation of a metropolitan desegregation plan.

The United States Court of Appeals affirmed the findings of *de jure* segregation against the Detroit Board and the State defendants, 484 F2d 215. The constitutional violations found to have been committed by the State of Michigan are set forth at pages 238-241 of that opinion.

While this Court in *Milliken* v *Bradley*, 418 US 717 (1974), remanded the case for formulation of a desegregation plan limited to the city boundaries of the City of Detroit, this Court did not reverse the finding that the State of Michigan had committed acts of *de jure* segregation.

Upon remand, the case was assigned to the Honorable Robert E. DeMascio who ordered both the Detroit Board and the plaintiffs to submit desegregation plans, and ordered the State Board of Education to submit a critique of the Detroit Plan.

The Detroit Board's desegregation plan included pupil reassignment, magnet schools and the educational components herein at issue. These "components" are educational programs to be added to the regular school curriculum because they are

essential to eradicate the effects of past segregation and to the implementation of an effective desegregation plan for Detroit. 402 F Supp at 1118-19 (36a).[1]

The legal propriety of these educational components in a desegregation plan, and the liability of the State defendants for their share of the cost of implementing them are the only issues raised by petitioners. All other matters, such as pupil reassignment, faculty reassignment and bus purchases are irrelevant in this appeal and are not discussed herein.

Extensive hearings were held on the two plans submitted by plaintiffs and the Detroit Board. On August 15, 1975, the District Court entered its Memorandum Opinion and Remedial Decree (7a) in which it found that nine educational programs were needed to remedy the effects of past segregation, to assure a successful desegregative effort and to minimize the possibility of resegregation. Among these nine were the programs of reading, in-service training, testing and counseling and guidance which are specifically at issue here because the State defendants have been ordered to share the cost of their implementation. Components implemented by the Detroit Board alone have not been the subject of any appeal.

The Court's finding that these programs were essential to the implementation of a desegregation plan in Detroit is amply supported by the record testimony of witnesses of the Detroit Board, among them Dr. Edward Simpkins, Dean of Wayne State University School of Education; the plaintiffs' experts, Dr. Gordon Foster and Dr. Michael Stolee; and by the State defendants' own expert, Dr. Charles Kearney, Associate Superintendent for Research and School Administration of the Michigan Department of Education, who testified that educational components were "required" to desegregate. (Vol. XXX, Tr.179).

The District Court's Partial Judgment and Order of August 15, 1975 (89a) directed the Detroit Board and the State Board to formulate and devise a comprehensive testing program in the Detroit school system (95a), and directed the Detroit Board to

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1 Hereafter, page numbers followed by the letter (a) and enclosed in parentheses refer to the Appendix to Petition for Certiorari.

institute comprehensive programs for in-service training, counseling and career guidance, testing, (95a), and a "comprehensive instructional program for teaching reading and communication skills" in every school in the system. (92a). The parties responded by filing the requisite submissions with respect to those educational components that are the subject of this petition for review: reading and communication skills, in-service training, testing and counseling and career guidance.

These submissions on the four components to be implemented were prepared by the staff of the Detroit Public Schools, and clearly indicate that the programs to be implemented are not expansions of existing programs (as the State has characterized them) but are new programs developed, pursuant to Court order, to meet the needs of a school system undergoing desegregation. The District Court entered various orders approving these submissions and ordering their implementation.

On May 11, 1976, the District Court entered its final Judgment in this matter. (145a). The Judgment ordered into effect in the Detroit School system on or before the September, 1976 school term comprehensive programs for: a) Reading and Communications Skills, b) In-Service Training, c) Testing, [and] d) Counseling and Career Guidance, and ordered the State Defendants to pay one-half the additional cost. (146a-147a).

Pursuant to the May 11, 1976 Order, the District Court required the Detroit Board to submit to the State Board of Education "its highest budget allocated in any year for each of the above-enumerated quality education programs", and thereafter, compute "the excess cost in addition thereto occasioned by the specific implementation of the court-ordered programs". This was referenced to the reading, in-service, testing, and counseling components.

The Sixth Circuit's concern over the financing of the educational components essential to desegregating Detroit stems from the clear record evidence that the Detroit Board, indeed, has serious financial problems. The reasons for these financial problems, including the adoption of a survival budget, bankruptcy of the system, constant millage failures and an eroding tax base,

were confirmed and recognized by the Sixth Circuit in the Appendix to its opinion. *Bradley* v *Milliken*, ___F2d ___, (August 4, 1976), Slip Op. at 33-40.

Recognizing that both the State defendants and the Detroit Board were found guilty of acts of *de jure* segregation, and recognizing the precarious financial plight of the Detroit school system, the wisdom of equity, as exercised by the District Court and affirmed by the Sixth Circuit, set as the basic ground rule here that the wrongdoing co-defendants should share the cost of the remedy.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS AFFIRMING INCLUSION OF EDUCATIONAL COMPONENTS IN DETROIT'S DESEGREGATION PLAN WAS CLEARLY WITHIN ITS EQUITY POWERS AND SUPPORTED BY RECORD EVIDENCE.

A. Educational Components Are Within The Scope Of The Remedy For Segregation.

The State defendants argue that the equitable maxim the nature of the violation determines the scope of the remedy precludes the inclusion of educational components in a school desegregation plan because no violation was found in the areas of the four court ordered components. The State defendants rely on this Court's language in *Swann* v *Charlotte-Mecklenburg Board of Education*, 402 US 1 (1971), and its holding in *Milliken* v *Bradley*, 418 US 716 (1974).

The issue these educational components raise concerns the remedial powers of equity, not "legal standards" as the State defendants have characterized it. Neither *Swann* nor *Milliken* limits equity's power to include educational components in a desegregation plan.

The statement in *Swann* is limited by the Court's preceding discussion that while it is within the discretionary power of school authorities to decide that each school should have a racial mixture of students, to do so would not be within the authority of a federal court "absent a finding of a constitutional violation". 402 US at 16.

Swann does not limit the power of equity once a constitutional violation has been found, it merely states that judicial powers may be exercised only on the basis of a constitutional violation. *Swann* also holds that once a violation is found, judicial authority may be invoked and its remedial powers are broad.

> "* * * Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." (402 US at 15)

Therefore, the language the State defendants rely on in *Swann* is not applicable in the context of this case because the constitutional violation of segregated schools has been found to have been committed by the State defendants as well as the Detroit Board. Consequently, the Court has the right and the duty to exercise its broad equitable powers in fashioning a remedy. Nor does this Court's decision in *Milliken* exclude educational components under the facts of this case. In *Milliken*, this Court reversed a remedial decree that involved parties against whom no constitutional violation had been alleged or proved. In this case, the remedy is confined to the parties found to have committed the violation and to the particular school district in which the violation occurred.

The State urges this Court to hold that the constitutional violation of segregation of the races in public schools means only that blacks and whites do not attend schools together, and that the Federal Courts are powerless to order any remedy for segregation other than pupil reassignment. This is not the law.

A desegregation plan which includes programs in reading, testing, in-service training and counseling and career guidance is within the scope of the remedy a court of equity may order because the constitutional violation of segregation caused the deterioration both of the quality of education and of school facilities. Educational components are designed to correct conditions caused by segregation. Consequently, these components are a proper part of the remedy.

Secondly, in a desegregation plan these educational components are within the scope of equity's remedial powers because

they are necessary to make a plan realistically work now and in the future.

1. The Nature of The Violation

Ever since *Brown* v *Board of Education of Topeka*, 347 US 483 (1954), courts have recognized that the evil of segregation is not the fact of separation but the effects of separation.

> "* * * We must look instead to the effect of segregation itself on public education.
>
> * * *
>
> "* * * To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:
>
> 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with a sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.' " (347 US at 492-494).

Since *Brown*, numerous courts have recognized that the effects of segregation are not limited to the physical separation of the races, but extend to and affect all aspects of education, as pointed out by Justice Brennen in describing the segregated school system of New Kent County:

> "* * * Racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations — faculty, staff, transportation, extracurricular activities and facilities." *Green* v *School Board of New Kent County*, 391 US at 430, 435 (1968).

In this case of *Bradley*, plaintiffs alleged a denial of equal educational opportunity, in paragraph XVIII of their Complaint. There is record evidence at the violation stage of this case, which the State defendants conveniently ignore, that the effects of segregation extended virtually to every facet of school operations and that black school children of Detroit suffered many ill-effects from segregation. For example, by the eighth grade, predominantly black schools were on the average two or more grade levels behind predominantly white schools as measured by standard achievement test scores. (8 Tr. 1008-09).[2] There is absolutely no evidence in the record that such disparity resulted from some inherent inferiority of black children as a group compared to white children. Rather, as a group and on the average black and white children arrive in school with the same potential and much the same levels of tested achievement. (8 Tr. 874-876m 933). Only thereafter, with the experience of school segregation, does this tested achievement disparity appear and grow. (8 Tr. 874-876; P.Ex. 134A).

Black children received less of the district's teaching and monetary resources. More emergency substitutes, fewer highly paid and experienced teachers and more inexperienced and low-paid teachers were assigned to black schools than to white. (P.Ex. 161A-C, 162A-C, 164A-C). Per pupil expenditures of the district's own funds (as distinguished from federal and state compensatory funds) was between 40 and 50 dollars less in black schools than in white schools (P.Ex. 163A-C, 164A-C, 163AA-CC, 164AA-CC), and the average salary of teachers assigned to black schools was between $1800 and $1900 less than the average salary of teachers assigned to white schools (P.Ex. 163A-C, 164A-C, 163AA-CC, 164AA-CC, Def. Ex. NNN).

2. The Scope Of The Remedy

While the central issue in *Swann* dealt with problems of student assignment, the Court recognized that because the ef-

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2 Transcript and exhibit references are to the violation hearings.

fects of segregation can and do take many forms, the remedy of desegregation properly may encompass more than mere pupil reassignment.

> "* * * Although the several related cases before us are primarily concerned with the problems of student assignment, it may be helpful to begin with a brief discussion of other aspects of the process.
>
> "In Green, we pointed out that existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system. 391 US, at 435, 20 L ED 2d at 722. Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown." (402 US at 18).

Desegregation is an equitable remedy. The broad power of a court of equity to fashion remedies has been described many times, but never more eloquently than by Justice Felix Frankfurter writing for this Court in *Hecht* v *Bowles*, 321 US 329 (1944), when he stated, at pages 329-330:

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."

In an earlier case, this Court spoke to the matter of the flexibility of equity's remedial powers as follows:

> "* * * Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights of all parties before them." *Alexander* v *Hillman*, 296 US 222 (1935).

Speaking to the remedial obligations of a court of equity in a discrimination case, this Court stated:

> "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v *United States*, 380 US 145, 154 (1965).

Recently in a housing discrimination case, the United States Court of Appeals, Eighth Circuit, echoed this same theme, that in devising a remedy a court of equity must repair all of the damage suffered by the party suffering the discrimination:

> "The goal of equitable relief . . . is to restore the plaintiff to the enjoyment of the right which has been interferred with to the fullest extent possible. . . . " *Graves* v *Romney*, 502 F2d 1062, 1064-65 (8th Cir. 1974).

Thus, when a constitutional violation has been found, courts of equity have the power to devise flexible remedies which are suited to the circumstances of the case and which have the qualities of mercy and practicality. In addition, in devising remedies courts of equity are charged with the duty to eliminate all past wrongs and to prevent future wrongs.

Each school desegregation case is unique. In reviewing specific desegregation plans every appellate court has stressed the fact that for the school system then under judicial scrutiny, the plan does or does not meet constitutional requirements. "There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case", *Green* v *School Board of New Kent County*, 391 US 430, 439 (1968); "* * * the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the particular circumstance", *Swann* v *Charlotte-Mecklenburg Board of Education*, 402 US 1, 17 (1971); "However, for today and in Atlanta, the unique features of this district distinguish every prior school case pronouncement", *Calhoun* v *Cook*, 522 F2d 717, 719 (5th Cir. 1975).

Because each school desegregation case must be decided on its own facts, and because equity's remedies are flexible and expansive courts must be free to fashion new remedies or

modify old remedies, in order to meet the requirements of each case. For example, in unanimously affirming that part of the district court's decision involving a program for quality education in magnet schools, the court in *Morgan* v *Kerrigan*, 530 F2d 401 (1st Cir. 1976), *cert. denied* 96 S Ct 2648 (1976), stated:

> "This provision of the order being innovative is without precise precedent in other cases. But in light of the background of the case and the particular objective being served, we hold the best efforts provisions to be within the equitable discretion of the court." (530 F2d at 429)

Surely this Court would not limit the innovative powers of lower courts to desegregate by accepting the State dedendants' theory that the only judicially available remedy for segregation is pupil reassignment.

The District Court was faced with the problem of restoring the plaintiffs to "the enjoyment of the right which has been interferred with to the fullest extent".

Remedial hearings lasted six weeks. Based on the unrefuted testimony of witnesses of the plaintiffs, the Detroit Board and the State defendants, the District Court made the following findings of fact regarding the need for educational components in the Detroit desegregation plan:

> "* * * We find that the majority of the educational components included in the Detroit Board plan are essential for a school district undergoing desegregation. While it is true that the delivery of quality desegregated educational services is the obligation of the school board, nevertheless this court deems it essential to mandate educational components where they are needed to remedy effects of past segregation, to assure a successful desegregative effort and to minimize the possibility of resegregation. In a segregated setting many techniques deny equal protection to black students, such as discriminatory testing, discriminatory counseling and discriminatory application of student discipline. In a system undergoing desegregation, teachers will require orientation and training for desegregation. Parents need to be more closely involved with the school system and properly structured programs must be devised for improving the relationship between the school and the community.

* * *

> "Additionally, we find that a testing program, vocational education and comprehensive reading programs are essential. We find that a comprehensive reading instruction program together with appropriate remedial reading classes are essential to a successful desegregative effort." 402 F Supp at 1118-19. (36 a and b).

In affirming this finding of the District Court, the Court of Appeals stated:

> "This finding of fact is not clearly erroneous but to the contrary is supported by ample evidence."

The Court of Appeals commented on the four programs at issue as follows:

> "The need for in-service training of the educational staff and development of non-discriminatory testing is obvious. The former is needed to insure that the teachers and administrators will be able to work effectively in a desegregated environment. The latter is needed to insure that students are not evaluated unequally because of built-in bias in the tests administered in formerly segregated schools."

* * *

> "Without the reading and counseling components, black students might be deprived of the motivation and achievement levels which the desegregation remedy is designed to accomplish.
>
> "Accordingly, we conclude that the findings of the District Court as to the Educational Components are supported by the record. This is not a situation where the District Court 'appears to have acted solely according to its own notions of good educational policy unrelated to the demands of the Constitution.' *See, Keyes* v *School District*, 521 F2d 465, 483 (10th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3399 (US Jan. 12, 1976). We hold that the District Court acted within its equity powers in requiring the Educational Components as a part of the remedy.

> The decision of the District Court prescribing these components is affirmed." (170, 171a).

The District Court's finding that educational components are a necessary part of this desegregation plan is not analogous to the finding of the District Judge which lead to including suburban school districts in the remedy. A multi-district remedy was reversed by this Court on the ground that no remedy could be imposed on suburban districts when there was no record evidence "that acts of the outlying districts effected the discrimination found to exist in the schools of Detroit." *Milliken* v *Bradley*, *supra*, 418 US at 752.

In the instant case, the District Judge's finding that educational components are required "to remedy effects of past segregation, to assure a successful desegregative effort and to minimize the possibility of resegregation" (36a) is based on the record testimony of witnesses called by the Detroit Board, plaintiffs and the State defendants. The State defendants do not dispute the fact that this testimony is unrefuted. The only parties included in the remedy of educational components are the defendants found to have committed the violation of *de jure* segregation, namely the State defendants and the Detroit Board. The State defendants have misconstrued this Court's decision in *Milliken*, and ignored the fact that they have been found guilty of segregation.

These components must be reviewed in the context of the facts as they exist in Detroit, Michigan. They are one part of an equitable remedy designed to eliminate, to the fullest extent possible, all of the damage done by segregation and to make the remedy of desegregation lasting and meaningful. The State defendants have raised a spurious legal issue by claiming that there must be a violation found with respect to educational programs before educational components can be included in a desegregation plan.

Two lower courts have found that it is clearly within the power of a court of equity to include educational components in a desegregation plan when the record abundantly supports a need for them as part of the remedy for segregation.

B. There Is No Conflict With Other Jurisdictions

As a second reason for granting their petition, the State argues that the decision is in conflict with *Keyes* v *School District No. 1, Denver, Colorado*, 521 F2d 465 (10th Cir. 1975). However, the *Keyes* case is easily distinguished, because it does not hold that a desegregation plan must be restricted to procedures which effect only the racial composition of the schools.

In *Keyes*, the District Court ordered the implementation of the Cardenas Plan for the bicultural-bilingual education of minority students. The school district opposed this. The Court of Appeals reversed the District Court, not because a desegregation plan could not include such a program, but because the program to be implemented represented a complete overhaul of the system's approach to education of minorities and was to be arbitrarily imposed on reluctant school authorities by the Court.

> "* * * But the court's adoption of the Cardenas Plan, in our view, goes well beyond helping Hispano school children to reach the proficiency in English necessary to learn other basic subjects. *Instead of merely removing obstacles to effective desegregation*, the court's order would impose upon school authorities a pervasive and detailed system for the education of minority children. We believe this goes too far." (521 F2d at 482, emphasis added).

It is obvious that *Keyes* spoke only to the particular plan adopted by the District Court and opposed by school authorities. It does not stand for the State's theory that the inclusion of educational components in a desegregation plan exceeds the remedial powers of a court of equity. In fact, no court has so held, and we remind this court that the concept of quality education in a desegregation plan has been approved in *Hart* v *Community School Board of Brooklyn, New York School District #21*, 383 F Supp 699 (E.D. N.Y. 1974), *aff'd*, 512 F2d 37 (2nd Cir. 1975) and *Morgan* v *Kerrigan*, 530 F2d 401 (1st Cir. 1976).

The remedy of educational components in a school desegregation plan does not exceed the nature of the violation of segregated schools. Instead such a remedy falls within the broad power of equity to correct the violation to the fullest extent

possible by taking whatever steps are necessary to correct that violation.

The cases of *Brown* v *Board of Education*, 347 US 483 (1954), and *Pasadena City Board of Education* v *Spangler*, ___ US ___; 96 S Ct 2697 (1976) are totally inapplicable because the issue of the propriety of educational components in a school desegregation plan was neither raised, nor decided in those cases.

Swann and Milliken are not applicable in the instant case. A violation has been found as to both the State and the Detroit Board. Therefore, this case is not within the language of *Swann*. New parties against whom no violation has been found are not to be included in the remedy. Therefore, *Milliken* does not apply. The District Court simply devised a remedy designed to eradicate the effects of a proven violation and ordered the parties found to have committed *de jure* acts of segregation to participate in that remedy.

II.

NEITHER THE CONSTITUTION NOR DECISIONS OF THIS COURT PROHIBIT THE LOWER COURTS HERE FROM COMPELLING THE STATE DEFENDANTS WHO HAVE BEEN FOUND GUILTY OF DE JURE SEGREGATION TO PAY FOR PART OF THE COST OF DESEGREGATION.

A. The State Defendants Are Proper Parties To Finance A Remedy for Constitutional Violations They Have Committed.

In resisting any efforts to be included in a Detroit-only remedy, the State defendants have argued two basic erroneous theories: (1) Inasmuch as no constitutional violations have been proven against the State defendants in the area of school district finance, there is thus no duty by the State defendants to disperse State funds from the State treasury as an incident to the implementation of a desegregation plan: and, (2) the Tenth and Eleventh Amendments bar a prospective injunctive order for school desegregation which requires the payment of State funds from the State treasury to implement the remedy.

At the initial violation stage of this litigation the District Court and the Sixth Circuit clearly and emphatically found that the State defendants were a substantial cause of the violation of the constitutional rights of Detroit school children. *Bradley* v *Milliken*, 338 F Supp 582, 589 (E.D. Mich. 1971); *Bradley* v *Milliken*, 484 F2d 215, 238-241 (6th Cir. 1973). Though the State defendants urged this Court to overturn the findings of State responsibility for *de jure* segregation in the Detroit school system, in their 1973 Petition for Writ of Certiorari, at page 12, this Court did not do so. In fact, this Court affirmed the finding that the State defendants were guilty of acts of *de jure* segregation in Detroit. *Milliken* v *Bradley*, 418 US 717, 725-728, 746 (1974). It was subsequently reaffirmed when this Court interpreted *Milliken* and unanimously stated ". . . The State of Michigan had been found to have committed constitutional violations contributing to racial segregation in the Detroit schools, 418 US at 734-735, note 16 . . . ". *Hills* v *Gautreaux*, 96 S Ct 1538, 1545, n. 13 (1976).

In the August 4, 1976 decision the Sixth Circuit was only reiterating what is obvious by the history of the litigation of this case when it stated:

> "It is the law of this case that both the State of Michigan and the Detroit Board of Education have committed acts which have been causal factors in creating *de jure* segregation which exists in the public schools of Detroit", *Bradley* v *Milliken*, ___F2d ___. (155a).

The issue here is not a revisiting of *San Antonio Independent School District* v *Rodriguez*, 411 US 1 (1973). The issue here is whether co-defendants guilty of a constitutional violation should share in the cost of remedying that violation. The statement of the issue makes this case almost textbook law.

Once State action has been established and has been determined to be "causally related to the substantial amount of segregation found in the Detroit school system", *Bradley*, *supra*, 484 F2d at 241, then it is within the federal courts' broad equity power to require the State defendants to remedy this segregated condition. *Cooper* v *Aaron*, 358 US 1, 16 (1958); *Evans* v *Buchanan*, 379 F Supp. 1218, 1221-1222 (D. Del. 1974),

aff'd 423 US 963 (1975), *reh. denied*, 423 US 1080 (1976); *Oliver* v *Michigan State Board of Education*, 508 F2d 178, 187, (6th Cir. 1974), *cert. denied*, 421 US 963 (1975).[3] State officials may be ordered to take the necessary measures to completely eliminate from the Detroit public schools "all vestiges of state-approved segregation". *Swann*, 402 US at 15; *See also*, *Bradley* v *Milliken*, 338 F Supp. 582, 593-594 (E.D. Mich. 1971).

Inasmuch as these State defendants, unlike few other school cases, have been found guilty of *de jure* segregation, they have an obligation to remedy the existing segregation in Detroit without curtailing the necessary educational programs presently in operation in Detroit schools. This principle was stated in *Hart* v *Community School Board of Brooklyn*, 383 F Supp 699 (E.D.N.Y. 1964), *aff'd*. 512 F2d 37 (2nd Cir. 1975), wherein the Court described the State's responsibility in a desegregation plan as follows:

> "As part of the State's obligation to eliminate segregation there is, of course, a concomitant obligation to insure that there is no dimunition in the quality of education . . .". 383 F Supp at 741.

The State defendants, as wrongdoers, may not sit by idly and attempt to excuse themselves from the remedy which their unconstitutional actions have made necessary and argue that the financing of the desegregation plan is in contravention of state law. Such a concept makes a mockery of the Constitution and nullifies both *Brown I* and *Brown II*.

In devising a remedy for school segregation a federal court is not bound by state law. A desegregation plan is a matter of a

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3 In *United States* v *Board of School Commissioners of Indianapolis*, 503 F2d 68, 80, 82 (7th Cir. 1974), the Seventh Circuit found an affirmative duty on the Indiana state officials to assist in desegregating the Indianapolis school system. In *Morgan* v *Hennigan*, 379 F Supp 410, 477 (D. Mass. 1974), *aff'd sub.nom.*, *Morgan* v *Kerrigan*, 509 F2d 580 (1st Cir. 1974), the Court found no constitutional violation but recognized the need to have the resources of those state officials, with state-wide control over education, and retained jurisdiction over them so that they would assist in desegregating the Boston school system. In *Brinkman* v *Gilligan*, 503 F2d 684, 704 (6th Cir. 1974), the appellate court directed that the Ohio state defendant be retained as parties to the action for purposes of remedying *de jure* segregation.

federal remedy for a violation of federal rights. *North Carolina State Board of Education* v *Swann*, 402 US 43, 45 (1971). *See Louisiana* v *United States*, 380 U.S. 145, 154-156 (1965); *Haney* v *Board of Education of Sevier County*, 429 F2d 364, 368 (8th Cir. 1970). As stated in *Milliken* v *Bradley*, 418 US 717 (1974):

> "Of course, no state law is above the Constitution. School district lines in the present laws with respect to local control, are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies." 418 US at 744.

Thus, the State defendants erroneously seek to insulate themselves from a federal court remedial order through the subterfuge of administrative legislation designed to subordinate constitutional rights.

B. Neither The Eleventh Nor Tenth Amendments Prohibit The Power of Courts To Compel The Expenditure Of Public Funds To Remedy An Unconstitutional Condition.

The State defendants' reliance on *Edelman* v *Jordan*, 415 US 651 (1974) for the proposition that the Eleventh Amendment prevents the State's financial participation in remedying a constitutional violation that the State caused is misplaced. This contention has consistently been laid to rest in school cases as quickly as it has been raised. *See Cooper* v *Aaron*, 358 US 1 (1958); *Griffin* v *School Board of Prince Edward County*, 377 US 218, 328 (1964); *Swann* v *Charlotte-Mecklenburg Board of Education*, 318 F Supp 786 (W.D. N.C. 1970).

Although this Court has, on occasion, recognized the immunity of states from suits involving *direct* actions against governmental funds or property, when brought for the complainants' personal benefit, this Court has not deemed the Eleventh Amendment a serious impediment to judicial action when the protection of compelling constitutional guarantees has been an issue. *See e.g.*, *Osborn* v *Bank of the United States*, 22 US (9 Wheat.) 738 (1824); *Graham* v *Folsom*, 200 US 248 (1906); *Ex Parte Young*, 209 US 123 (1908).

This Court in *Edelman* distinguished between a legally cognizable prospective injunctive relief directed toward the State as opposed to a retroactive money judgment against the State

treasury. In doing so, this Court acknowledged that orders such as those entered in *Ex Parte Young*, *supra*, and subsequent cases had, in fact, substantial impacts on State revenues. 415 US at 667.

This Court then analyzed several cases dealing with injunctive relief against welfare officials and stated that the shaping of official conduct to conform to the mandate of a court decree would most likely result in an expenditure from the State treasury. Such an ancillary effect on the State treasury is a permissible and often inevitable consequence of the principle announced in *Ex Parte Young*. 415 US at 667-668. The majority opinion thus recognized that the Eleventh Amendment would not apply "where a federal court applies *Ex Parte Young* to grant prospective declaratory and injunctive relief, as opposed to an order of retroactive payments . . ." 415 US at 666, n. 11.

In *Fitzpatrick* v *Bitzer*, ____US____, 96 S Ct ____, 49 LEd2d 614, 44 U.S.L.W. 5120 (1976), this Court held that the Eleventh Amendment did not bar a back pay award under Title VII enacted by Congress pursuant to Section 5 of the Fourteenth Amendment because the Eleventh Amendment provisions are limited by the enforcement provisions of Section 5 of the Fourteenth Amendment. 49 LEd2d at 621; 44 U.S.L.W. at 5123.

Mr. Justice Stevens in a concurring opinion analyzed the Eleventh Amendment argument and stated that it does not bar an action against state officers enforcing an invalid statute. 49 LEd2d at 623, 44 U.S.L.W. at 5124. Mr. Justice Stevens then stated:

> "The fact that the State will have to increase its future payments into the fund as a consequence of this award does not, in my opinion, sufficiently distinguish this case from other cases in which a state may be required to conform its practices to the federal Constitution and thereby to incur additional expense in the future." 49 LEd2d at 624, 44 U.S.L.W. at 5124.

In *Scheuer* v *Rhodes*, 416 US 232 (1974) this Court held that since *Ex Parte Young*, it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he has deprived another of a federal right under the

color of state law. 416 US at 237. *See also Huecker* v *Milburn*, 538 F2d 1241, 1243-1245 (6th Cir. 1976).

Several Courts of Appeal have found an affirmative duty for state officials to assist in remedying unconstitutional conditions and have rejected the Eleventh Amendment arguments of state officials attempting to avoid constitutional responsibilities. *Bradley* v *Milliken*, 484 F2d 215, 258 (6th Cir. 1973) (holding that a federal court may order that public funds be expended to meet constitutional requirements); *Wyatt* v *Aderholt*, 503 F2d 1305, 1314-1315 (5th Cir. 1974) (holding that a state legislature is not free, for budgetary or any other reasons, to provide a social service in a manner which results in the denial of individuals' constitutional rights); *United States* v *Board of School Commissioners of Indianapolis*, 503 F2d 68, 82 (7th Cir. 1974) (holding that the Eleventh Amendment does not prevent enforcement of the Fourteenth Amendment); *Lewis* v *Shulimson*, 534 F2d 794, 795 (8th Cir. 1976) (holding that the notification expenses and the future medical assistance payments were the necessary result of compliance with the decree which by its terms was prospective in nature).

The decision of the lower court in the present case imposes no money judgment on the State of Michigan for past *de jure* segregation practices. Rather, the order is directed toward both the Detroit Board and the State defendants as a part of a prospective plan of injunctive relief to comply with a constitutional requirement to eradicate all vestiges of *de jure* segregation "now and hereafter". *Alexander* v *Holmes County Board of Education*, 396 US 19, 20 (1969).

For the first time, the State defendants have now raised the question whether the lower court's orders violate the Tenth Amendment. Neither the District Court nor the Sixth Circuit Court of Appeals was ever given the opportunity to review this argument. The Supreme Court cannot decide issues raised for the first time in this Court. *Tacon* v *State of Arizona*, 410 US 351, 352 (1973).

The primary reliance for the improper Tenth Amendment proposition is this Court's recent decision in *National League of Cities* v *Usery*, ____ US ____, 96 S Ct 2465 (1976). The holding in

Usery is inapposite to this proceeding and to the facts and the law of this case.

Usery dealt with a challenge to the exercise of Congress' power to regulate commerce. 96 S Ct at 2475. Whereas this Court found in *Usery* that the Fair Labor Standards Act resulted in an interference with the conduct of integral governmental functions, it is difficult to perceive how the vindication of constitutional rights in this case would in any meaningful manner infringe upon 'functions essential to the separate and independent existence' of the Michigan state government.

The requirement that the State defendants, as a part of a prospective plan to comply with a constitutional mandate, expend funds does not 'curtail in any substantial manner the exercise of state powers'. Rather, it lawfully requires state officials to conform their actions to the requirements of the Constitution.

Given the findings of state violations, the consequent remedial obligation of the Fourteenth Amendment and the inclusion of the necessary state party defendants in this action, sound logic and settled law dictate that the State defendants are the proper parties to assist in the remedy. In this regard, the order of the lower court does not diminish or interfere with any "policy choices" under the 10th Amendment which the State defendants, by their previous unconstitutional actions, have not already precluded themselves from performing.

Neither the Tenth nor the Eleventh Amendments bar the inclusion of State defendants in the prospective injunctive relief required in Detroit even if that relief has an ancillary effect upon a State treasury.

It is interesting to note that these same State defendants did not object to the requirement of the June 19, 1975 Order of the Sixth Circuit Court of Appeals relative to the purchase of 150 school buses. 519 F2d 679, 680 (6th Cir. 1975), *cert. den'd.*, 423 US 930 (1975). Presumably, the requirement of that Order that the State defendants 'allocate and re-allocate existing or new funds' was just as objectionable under the Eleventh Amendment as is the present Order of the lower court which these same defendants seek to have reviewed.

It becomes readily apparent that the present State defendants through the exercise of the inherent powers which they possess as officers and instrumentalities of the state and through the persuasive powers which their officers command, can and should effectuate and implement the educational components ordered by the lower court. The State defendants have not and cannot cite cases holding that State defendants, having been found guilty of segregation, cannot be required to expend the funds to correct a constitutional violation.

C. The Balancing of Interests Requires An Allocation of Costs Between the State and Detroit Board Defendants.

At pages 23-26 of their Petition, the State defendants claim that the state budget does not have the money to comply with the lower court order because it will end the 1975-76 fiscal year with a deficit. It is difficult to understand why the State defendants would choose to argue and allocate the costs of desegregation for the 1976-77 school year to the already expired 1975-76 state budget.

It would be logical to assume that the obligations for the 1976-1977 school year would be funded by the State defendants from the new 1976-1977 state budget.

On pages 24-26 of the Petition, the State defendants advance the same financial arguments which were considered by the lower courts in arriving at the allocation of the desegregation costs. The Detroit Board has contended that any requirement that it bear the major financial responsibility for the desegregation plan would not result in "balancing the individual and collective interests" as required by *Swann*, 402 US at 16. By arguing relative poverty, the State defendants contend that they should not be required to pay any of the costs of the desegregation programs.

Contrary to the allegations of the State defendants, the Detroit Board does not have the necessary financial resources to carry on the overall operations of the Nation's fifth largest school district and at the same time underwrite the total, or even a majority, cost of desegregation. In order for Detroit to merely maintain the *same* minimally adequate levels of programs and

services that existed in the 1975-1976 fiscal school year, for the 1976-1977 fiscal school year, a budget in the amount of approximately 336 million dollars will be required.

The anticipated general fund revenues for the fiscal year 1976-1977 are $316,131,845.00.[4] This means that the anticipated expenses for the present school year are approximately 20 million dollars more than the general fund revenues. This does not include any of the costs of desegregation.

The increased costs for the 1976-1977 school fiscal year over the 1975-1976 school fiscal year reflect no increase in the level of programs. The additional cost is merely the increased cost of doing business. Thus, absent additional general operating revenue dollars, programs will have to be, and have been, cut.[5]

The money coming to the Detroit Board in the form of state aid payments has already been factored into the 1976-1977 school budget.

The school system is still 20 million dollars short in an attempt to keep the minimum programs that it had in operation in the 1975-1976 school year. The general fund equity surplus in the 1975-1976 budget has been carried over and factored into the 1976-1977 budget.

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4 This figure was originally $320,231,845.00 but was reduced by 4.1 million dollars in state aid revenue due to the declining pupil enrollment in Detroit.

5 The state defendants allege that the Detroit Board will receive approximately 192.5 million dollars in state aid this school year, an increase of approximately 28.5 million dollars over the previous year funding. However, 10 million dollars of the 192.5 million dollars represents Chapter III categorical state aid funding which cannot be allocated to general operating expenses. Thus, the Detroit Board shall receive only approximately 182.5 million dollars in general operating funding from the state as reduced by 4.1 million dollars due to the declining student enrollment.

The alleged increase of approximately 28.5 million dollars from state funding sources is misleading. Although this figure has already been factored into the Detroit Board "deficit" budget for 1976-1977, this figure represents only approximately 8 million dollars in state funding for general operating purposes over 1975-1976. This increase is proportionately similar to increases all eligible school districts received in 1976-1977. 17 million dollars of the 28.5 million dollar figure represents state Aid reimbursement for local property tax loss resulting from the Michigan Single Business Tax and is not a true increase due to the offsetting decrease in local revenues. Additionally, there is the aforementioned 4.1 million dollar reduction due to declining enrollment.

When the Detroit school system realized in the summer of 1976 that there would be a $16,000,000 deficit (it now approaches $20,000,000 deficit by virtue of a reduction in anticipated state aid of 4.1 million dollars), and that under State law it must have a balanced budget, the Board undertook to cut existing programs. Program cuts included music programs, art programs, athletic programs, putting first graders on half day sessions, reducing the hours of instruction at the high school level as well as at middle school level. Despite a previous history of millage defeats the Board, on August 3, 1976, went to the Detroit voters, asking for a five mill increase in the school tax in order to restore the immediate cuts and to attempt to restore some of the programs that were cut back in 1971 as a result of the necessity for the Board to adopt a "suicide budget". *See* Appendix to Sixth Circuit's August 4, 1976 decision. (183a).

The August 3, 1976 millage election failed. Nevertheless, the Board has again placed 5 mills on the ballot for November 2, 1976. In the meantime, the State Board of Education has required the Board to restore full day classes at the first grade level as well as restore the high school programs, meaning that the district is now in serious deficit financing. Detroit is a district that during the course of this litigation has been on the verge of closing its doors because of previous deficit financing.

The State defendants correctly assess that in the event the millage vote passes, the Detroit school system would obtain approximately 37 million dollars in combined local property tax revenues and state school aid funds. However, at least 16 million dollars will be needed to restore the specific cuts in educational programs which the Detroit Board has made for the 1976-1977 school year from those same programs offered in 1975-1976. Additionally, at least 4.1 million dollars will be needed to offset the prior loss of state aid revenues due to declining enrollment. The remaining amount of the millage yield monies will be used to supplement program improvements that have been eliminated or delayed over the past several years because of previous "suicidal" budget cuts dating back to 1971. (183a-187a).

If there is any doubt about the destitute financial status of the Detroit school system this Court is again respectfully invited to

read the Appendix adopted by the Court of Appeals Sixth Circuit on August 4, 1976. (183a). The Detroit Board shudders to even think what will happen if the citizens of Detroit do not vote for the 5 mills. The Detroit system already having a $68,000,000 operating debt which it is paying off will go over the brink into bankruptcy. This is a sad commentary for the fifth largest school district in the United States of America located in the wealthy, industrial State of Michigan.

In addition to this, the State of Michigan says that it will not even share in the cost of essential educational components needed as part of the desegregation process.

The issue is not simply who has the better comparative ability to pay the costs of desegregation. A constitutional violation has been shown; the State defendants were a substantial cause of the violation; they must therefore share in the cost of remedying the violation.

Based upon the facts of this case, the Constitution and the decisions of this Court, there has been no showing of a need for the exercise of this Court of its supervisory powers over the courts below and Certiorari should be denied.

III.

NO SIGNIFICANT QUESTIONS OF FEDERAL LAW HAVE BEEN RAISED IN THE PETITION.

There is nothing unprecedented about the decisions of the courts below. The courts below are not assuming any functions of controlling curriculum and regulating educational finance in school desegregation cases. All the courts below did is accept the testimony of the State defendants' own witnesses, butressed by the testimony of plaintiffs' own witnesses and the Detroit Board witnesses, that educational components are essential to eradicate the effects of past unlawful segregation in Detroit and to implement a Detroit only desegregation plan.

These components cost money. The State defendants were found to have contributed to the cause of segregation in Detroit. As defendants they should share in the cost of desegregation. This is not a multi-district remedy but merely a reaffirmance of

what has long ago been established in the jurisprudence of this country, namely, that when two defendants have caused a wrong, then a court may require each of those defendants to share in the cost of remedying the wrong. This is all this case is about. A writ of certiorari should not be granted for such a simple, self-evident proposition.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should not be issued to review the decisions of the Sixth Circuit rendered herein on August 4, 1976.

Respectfully submitted,

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